

**In the
Supreme Court of the United States**

OCTOBER TERM, 1979

NO.

79-687

PHALA E. BONEY KYZAR, Mother
and Natural Guardian O/B/O
VIRGINIA L. BONEY and EMILY
A. BONEY, minor natural children
of Peter L. Boney, deceased,
Petitioner,

versus

Harris
~~JOSEPH A. CALIFANO, JR.,~~
Secretary of Health, Education
and Welfare of the United States.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

BONEY & BONEY, P.C.
F. H. Boney
P. O. Box 29
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IN THE
SUPREME COURT OF THE UNITED STATES

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PHALA E. BONEY KYZAR, Mother
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JOSEPH A. CALIFANO, JR.,
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and Welfare of the United States.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of
the Supreme Court of the United States.

Phala E. Boney Kyzar, the petitioner herein, prays that
a writ of certiorari issue to review the judgment of the United
States Court of Appeals, Fifth Circuit entered in the above-
entitled case on June 15, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit is reported at 597 F2d 68 and is printed in Appendix A hereto, *infra*, page A-1. The judgment of the United States District Court for the Northern District of Alabama is printed in Appendix C hereto, *infra*, page A-12. The Journal Entry of Judgment of the United States District Court for the Northern District of Alabama is printed in Appendix C hereto, *infra*, page A-13.

JURISDICTION

The judgment of the United States Court of Appeals, Fifth Circuit (Appendix A, *infra*, page A-1) was entered on June 15, 1979. A timely petition for rehearing was denied on July 30, 1979. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254 and 42 U.S.C. 405 (G).

QUESTIONS PRESENTED

1.

Does the Social Security Act require dependent natural minor children of a deceased worker to share insurance benefits with nondependent stepchildren residing in the same household with the stepfather when the stepchildren are being supported by their natural father?

3

2.

Should courts acting without a jury give consideration to the Federal Rules of Evidence?

3.

Should determining the intent of the legislative body be the primary objective of the courts in interpreting a statute?

4.

Should a presumption be construed to be conclusive when a determination that it is rebuttable would avoid a test on the constitutionality of the statute?

5.

Does the interpretation of the Social Security Act in such a manner as to preclude consideration of uncontradicted evidence that nondependent stepchildren and widow must share with minor natural children deprive dependent minor children of due process under the Fifth Amendment to the Constitution of the United States?

6.

What legitimate governmental interests will be promoted by a classification that will hold that all stepfathers living in the same household with their stepchildren for any period of

time and dying of accidental death are conclusively presumed to be supporting the stepchildren and the result of which takes insurance benefits from dependent natural children and provides a windfall for nondependent stepchildren and in addition takes insurance benefits from dependent minor children and pays to the widow for looking after her natural children who are being supported by her former husband and natural father of the stepchildren who have a living natural mother and living natural father to look to for support?

STATUTES INVOLVED

U. S. Constitution, Amendment 5, which reads as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

42 U.S.C. Section 402 (d) (4) which reads as follows:

"A child shall be deemed dependent upon his stepfather or stepmother at the time specified in

paragraph (1)(C) if, at such time, the child was living with or receiving at least one-half of his support from such stepfather or stepmother."

42 U.S.C. 416(k) which reads as follows:

"The requirements in clause (5) of subsection (c) or clause (5) of subsection (g) that the surviving spouse of an individual had been married to such individual for a period of not less than nine months immediately prior to the day on which such individual died in order to qualify as such individual's widow or widower, and the requirement in subsection (e) that the stepchild of a deceased individual have been such stepchild for not less than nine months immediately preceding the day on which such individual died in order to qualify as such individual's child, shall be deemed to be satisfied, where such individual dies within the applicable nine-month period, if—

(1) his death —

(A) is accidental, or . . . "?

28 U.S.C. Appendix Rules of Evidence for United States Court and Magistrates, Article III. Presumptions in Civil Actions and Proceedings, Rule 301. Presumptions in General Civil Actions and Proceedings, which reads as follows:

"In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against

whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

STATEMENT OF THE CASE

Peter L. Boney, deceased insured, married Phala in August, 1968. At the time of their divorce in July, 1972, they had two children Virginia and Emily, whom Peter continued to support until his accidental death in September, 1974.

In June, 1974 Peter married Candace Wilson, the former wife of Ewart Q. Wilson who is the father of her two daughters, Wendi and Shelly Wilson. Peter lived with Candace and her two children in their home until his untimely death. Ewart, however, continued to support his two children at least through the date of the administrative law judge's decision.

After Peter's death, Phala filed a claim for child's insurance benefits on behalf of Virginia and Emily, the natural children, which was granted. Thereafter, Candace filed claims for mother's insurance benefits for herself and for child's insurance benefits on behalf of Wendi Wilson and Shelly Wilson, the stepchildren. These claims for the widow and nondependent stepchildren were granted and the benefits to the natural dependent children were reduced.

Phala, on behalf of the natural children, filed timely objections and asked for a hearing before an administrative law judge. The administrative law judge ruled on February 28, 1977 that it was proper and correct to reduce the benefits of the natural children and that the widow and nondependent stepchildren were entitled to share in the insurance benefits. The ruling of the administrative law judge became the decision of the Secretary when it was approved by the Appeals Council on April 28, 1977.

Phala, on behalf of the minor natural children, having exhausted her administrative remedies and within time allowed by law, brought her petition to the United States District Court for the Northern District of Alabama, Southern Division for judicial review.

The District Court found no dispute in the evidence in that the deceased wage earner was living in the same residence as the stepchildren and that the stepchildren were being supported by their natural father. Even so, the District Court held that under the ruling of *Weinberg v. Salfi*, 422 U.S. 749, 45 L.Ed. 2d 522, 95 S.Ct. 2457, the stepchildren were entitled to share in the child's insurance benefits based on his earnings and that the benefits of the natural children were properly reduced.

The United States Court of Appeals, Fifth Circuit affirmed the United States District Court on the basis of the memorandum opinion of the District Court.

REASONS FOR GRANTING THIS WRIT

The decision is contrary to the general understanding of the Social Security Act and the intent and purpose of the Act for the reason that it was intended and generally believed by the public that the Act was a statutory insurance plan to provide protection or benefits for those persons who by tradition or legal requirements look to others for support when such persons are disabled or deceased such as parents for children. This decision repudiates this concept and conclusively holds that stepchildren residing in the same household with a stepfather for any period of time shall receive insurance benefits from the stepfather if the stepfather dies of accidental death. It matters not that the stepchildren are nondependent on the stepfather and that the stepchildren are being supported by their living natural father.

The decision in this case in our opinion is wrong and has decided an important question of federal law which has not been, but should be, settled by this Court.

This decision is not compelled by the ruling of this Court in *Weinberger vs. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed. 2d 522 in our opinion.

Petitioner believes that a reasonable construction of 42 U.S.C. Section 402 (d) (4) which reads as follows:

"A child shall be deemed dependent upon his stepfather or stepmother at the time specified in

paragraph (1) (C) if, at such time, the child was living with or receiving at least onehalf of his support from such stepfather or stepmother."

will avoid the necessity of deciding the constitutional issue involving the Due Process Clause of the Fifth Amendment to the United States Constitution.

We must concede that the word "deemed" was placed in the sentence for some purpose. Surely it was not mere surplusage. The Secretary and the Courts have construed the sentence as though the word "deemed" was not there. In fact they have held that it is improper to consider the word as having any meaning whatsoever. If the Congress had intended for all stepchildren living with a stepparent for any period of time to be a dependent of the stepparent if the stepparent died an accidental death, then it surely would have omitted the word "deemed" and the statute would have read,

"A child shall be dependent upon his stepfather or stepmother at the time specified in paragraph (1) (C) if, at such time, the child was

living with or receiving at least one-half of his support from such stepfather or stepmother."

Petitioner submits that the holding in *Weinberger vs. Salfi, supra*, is not controlling in the instant case for the reason that *Salfi* failed to present evidence that she and her daughter met the specified statutory requirements of 42 U.S.C. Section 416 (c) (5) which reads in part as follows:

"(c) Widow. The term 'widow' (except when used in section 202(i) [42 USCS Section 402(i)]) means the surviving wife of an individual, but only if (1) ". . ." (5) she was married to him for a period of not less than nine months immediately prior to the day on which he died," . . .

and, 42 U.S.C. 416 (e) which reads in part as follows:

"The term 'child' means (1) . . . "(2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died, and" . . .

No such problem exists in this case. Here the natural children are entitled to insurance benefits and the stepchildren are

entitled to insurance benefits and the stepchildren are entitled to benefits provided they are dependent on the deceased wage earner under the provisions of 42 U.S.C. Section 402 (d) (1) (c) (3) and (4) which reads in part as follows:

(d) Child's insurance benefits. (1) Every child (as defined in section 216(e)[42 USCS Section 416 (e)]) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child - - " . . .

"(C) was dependent upon such individual-". . .

"(3) A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1) (C) unless, at such time, such individual was not living with or contributing to the support of such child and - - " . . .

"(4) A child shall be deemed dependent upon his stepfather or stepmother at the time specified in paragraph (1)(C) if, at such time, the child was living with or receiving at least one-half of his support from such stepfather or stepmother."

It will be noted that dependency on the insured wage earner is a necessary requirement for receiving benefits. It also appears that the use of the word "deemed" in 42 U.S.C. Section

402(d)(1)(3) and (4) clearly indicates that the word "deemed" should be construed as a rebuttable presumption.

In our opinion Federal Rules of Evidence apply in the instant case and 28 U.S.C. Appendix Rules of Evidence for United States Court and Magistrates, Article III Presumptions in Civil Actions and Proceedings, Rule 301, *supra*, is controlling. The stepchildren presented evidence that they were residing in the same residence with the deceased at the time of his accidental death and were deemed or presumed to be dependent on the deceased. The natural children then rebutted this presumption and showed that in truth and in fact the stepchildren were not dependent on their stepfather. We submit that the Secretary and the District Court and the United States Court of Appeals have failed to recognize and construe the language in such a manner as to carry out the real intent of Congress.

A natural child must prove dependency under 42 U.S.C. 402 Section (d)(3), *supra*, if not living with his father by showing the father is contributing to his support. It seems unreasonable to refuse to consider evidence submitted that the stepchildren are not dependent and that the stepchildren are supported by their natural father under 42 U.S.C. 402(d)(4).

In our opinion once the natural children established their claims for insurance benefits as dependents of their deceased father to whom they looked for support these claims became property rights and thereafter could not be deprived of the same without due process of law as protected by the Fifth Amendment to the Constitution. In our opinion to hold that

the word "deemed" as used in the relevant section of the Act means a conclusive presumption and to refuse to consider the uncontradicted evidence that the stepchildren were not dependent on the deceased is a denial of the Due Process provisions of the Constitution.

Once again looking closely at *Weinberger v. Salfi, supra*, relied on by Respondent and the Courts below, the majority of this Court there affirmed that the Due Process Clause can be thought to impose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification. We submit that as construed the statute is patently arbitrary and utterly lacking in rational justification. *Salfi*, further affirms that a classification is not violative of the Due Process Clause of the Fifth Amendment if the goals sought are legitimate and the classification adopted is rationally related to achieve those goals. What goals are to be achieved in reducing insurance benefits to minor children who have lost their supporting natural father by accidental death and giving the reductions to stepchildren who were not dependent and who have not lost a supporting natural father?

Salfi, supra, also affirmed that if a classification had some "reasonable basis", it does not offend the Constitution. We ask what is the reasonable basis of dependency of stepchildren and accidental death of a stepfather and the occupation of the same residence with no provision as to duration of occupancy. We submit this is an unreasonable, arbitrary classification. The construction placed on the statute by Respondent would have been the same even if accidental death had taken

place one day or any time after the stepfather lived in the same house with the stepchildren. It seems clear that such a result would indicate that to construe the word "deemed" to be a conclusive presumption creates an unreasonable, arbitrary classification in violation of the Due Process Clause of the Fifth Amendment to the Constitution as stated in *Weinberger vs. Salfi, supra*.

Surely the separate dissenting opinions in *Weinberger vs. Salfi, supra*, indicate a need to grant the writ of certiorari in this case and more clearly present a guide for the Secretary and the Courts on this important issue. In the instant case the findings of fact desired by the minority dissenting Justices has been made by the Secretary and affirmed by the Courts. The only question now is shall the Secretary ignore the facts found and arbitrarily ignore the truth and give a windfall to nondependent stepchildren and the widow by taking from dependent natural children. We do not believe that was the purpose and intent of the Act enacted by Congress nor do we believe that was the intended construction to be placed on *Weinberger vs. Salfi, supra*, by either the majority or minority of this Court.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,
BONEY & BONEY, P.C.

Boney & Boney, P.C.
Counsel of Record
P. O. Box 29
Summerville, Georgia 30747
October 25, 1979

F. H. Boney
Counsel for Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 1979, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Mr. J. R. Brooks, United States Attorney, Federal Courthouse Building, Room 200, Birmingham, Alabama, 35203.

F. H. Boney
Counsel for Petitioner.

APPENDIX A

Phala E. Boney KYZAR, etc., et al.,
Plaintiffs,

Phala E. Boney KYZAR,
Plaintiff-Appellant,

v.

Joseph A. CALIFANO, Jr., Secretary of
Health, Education and Welfare of the
United States,
Defendant-Appellee.

No. 79-1024
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

June 15, 1979

Claimant brought action seeking judicial review of final decision of Secretary of Health, Education and Welfare reducing child's insurance benefits payable to claimant on behalf of her two minor children. The United States District Court for the Northern District of Alabama, Clarence W. Allgood, J., affirmed, and claimant appealed. The Court of Appeals affirmed on the basis of the opinion of the District Court, holding that

*Rule 18, United States Court of Appeals, Fifth Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co.*, 431 F.2d 409 (5th Cir. 1970).

deceased insured's stepchildren were "deemed dependent" at the time of the insured's death and was therefore entitled to child's insurance benefits under the Social Security Act, even though they were receiving child support payments from and were dependent upon their natural father at the time of the insured's death.

Affirmed.

1. Social Security and Public Welfare (148.10)

District court's scope of review in social security child's insurance benefits case is narrowly limited to two-part question of whether decision of Secretary of Health, Education and Welfare is supported by substantial evidence and based upon proper legal standards.

2. Social Security and Public Welfare (137)

Under provisions of Social Security Act that an insured's child shall be "deemed dependent" upon his stepfather or stepmother if child was living with such stepfather or stepmother at time of death of natural parent, Congress intended that dependency would be conclusively established upon proof of objective criteria, including fact that stepchildren were living with their stepfather at his death, and thus stepchildren of deceased insured, who were living with insured at the time of his death were "deemed dependent" upon insured and were therefore entitled to benefits, even though, at the time of the insured's death they were receiving child support payments from

and were dependent upon their natural father. Social Security Act, § 202(d). (d)(1, 4), 42 U.S.C.A. § 402(d), (d)(1, 4); U.S. C.A. Const. Amend. 5.

See publication Words and Phrases
for other judicial constructions and definitions.

Appeal from the United States District Court for the
Northern District of Alabama.

Before CLARK, GEE and HILL, Circuit Judges.

PER CURIAM:

[1,2] The judgment appealed from is affirmed on the basis of the Memorandum Opinion of the District Court filed November 14, 1978, attached hereto.

AFFIRMED.

MEMORANDUM OPINION

The plaintiff, Phala E. Boney Kyzar, brings this action pursuant to the provisions of Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), seeking judicial review of a final decision of the Secretary of Health, Education and Welfare reducing the child's insurance benefits payable to her on behalf of her two minor children. Having carefully reviewed the record in light of the argument of counsel, the court is of the opinion that the decision of the Secretary must be affirmed.

The facts are not in dispute. Peter L. Boney, the deceased

insured, married Phala in August 1968. At the time of their divorce in July 1972, they had two children, Virginia and Emily, whom Peter continued to support until his accidental death in September 1974. During the interim, in June 1974, Peter married Candace Wilson, the former wife of Ewart O. Wilson who is the father of her two daughters, Wendi and Shelley. Peter lived with Candace and her children until his untimely death. Ewart, however, continued to support his two children at least through the date of the administrative law judge's decision.

After Peter's death, Phala filed a claim for child's insurance benefits on behalf of Virginia and Emily, the natural children, which was granted. Thereafter, Candace filed claims for mother's insurance benefits and for child's insurance benefits on behalf of Wendi and Shelley, the stepchildren, as well as the natural children. These claims were granted on reconsideration.

As a result of the entitlement to benefits of Candace and the stepchildren, the original award to the natural children was reduced. Phala contested the reduction. After an unfavorable reconsideration determination, she requested a *de novo* hearing before an administrative law judge. In a decision dated February 28, 1977, the administrative law judge ruled that the benefits payable to plaintiff on behalf of the natural children were correctly reduced due to the entitlement of Candace and the stepchildren. This determination, became the final decision of the Secretary when it was approved by the Appeals Council on April 28, 1977.

This court's scope of review is narrowly limited to the two-pronged question of whether the decision of the Secretary is supported by substantial evidence and based upon proper legal standards. There being no dispute as to the first aspect of this inquiry, the court's only concern is whether the Secretary properly applied the law to the undisputed facts. The issue is whether the natural children of the deceased insured, who were both actually and statutorily deemed dependent upon the insured at the time of his death, must share their child's insurance benefits with the deceased insured's stepchildren, who met the statutory dependency criteria of the Act, but who were receiving child support payments from and were dependent upon, their natural father. This issue turns on the meaning of the terms "deemed dependent" as used in Section 202(d)(4) of the Act, 42 U.S.C. § 402(d)(4).

Child's insurance benefits are provided for in 42 U.S.C. § 402(d). Section 402(d)(1) states that an unmarried son or daughter - and under conditions met in this case, a stepson or stepdaughter - of an individual, who dies fully or currently insured under the Act, may apply for and be entitled to a survivor's benefit, if the applicant is under 18 years of age at the time of application (or is a full-time student and under 22 years of age) and was dependent, within the meaning of the statute, at the time of the parent's death. *Mathews v. Lucas*, 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976).

A child shall be *deemed dependent* upon his stepfather or stepmother at the time specified in paragraph (1)(C) of this subsection, if, at such time, the child was living with

. . . such stepfather or stepmother. 42 U.S.C. § 402(d)(4). (Emphasis added).

The administrative law judge treated the term "deemed" as the equivalent of conclusive presumption. The defendant contends that, under this presumption, proof of actual dependency of the stepchild on the insured is not necessary; in fact, a showing of non-dependency is not even permitted. Moreover, support furnished by the noncustodial natural parent is immaterial. The plaintiff, on the other hand, argues that such a construction causes the statute to run afoul of the Due Process Clause of the Fifth Amendment. Plaintiff further contends that the statute creates only a rebuttable presumption and that evidence of actual non-dependency should be admitted.

A survey of Supreme Court decisions dealing with similar provisions of the Social Security Act convinces this court that in § 402(d)(4) Congress meant to establish an objective test by which the dependency requirement of § 402(d)(1) is absolutely established upon proof that a stepchild was, for purposes of this case, living with the stepparent at the time of the latter's death. In particular, this court is guided to this conclusion by the recent cases of *Mathews v. Lucas*, *supra*, and *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975). These cases leave no doubt as to the constitutionality of this statutory scheme.

In *Mathews v. Lucas*, the Court was concerned with whether the child's insurance benefits provisions of § 402(d)(1) & (3) regarding the treatment of certain illegitimate children

are constitutional under the Due Process Clause of the Fifth Amendment. The Court found that the Congressional desire for administrative convenience and economy was served "by presuming dependency on the basis of relatively readily documented facts, such as legitimate birth, or existence of a support order or paternity decree, which could be relied on to indicate the likelihood of continued actual dependency. . . ." Congress was thus able "to avoid the burden and expense of specific case-by-case determination in the large number of cases where dependency is objectively probable." 427 U.S. at 509, 96 S.Ct. at 2764. Notwithstanding its tendency to be overinclusive - by entitling to benefits some children who were not actually dependent - the statute was declared constitutional because it met the familiar rational relation test traditionally applied in equal protection analysis, *Id.*

"Such presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny. See *Weinberger v. Salfi*, 422 U.S. 749, 772, 95 S.Ct. 2457, 2471, 45 L.Ed.2d 522 (1975). *Id.*

In *Weinberger v. Salfi*, *supra*, the constitutionality of the duration-of-relationship eligibility requirements for surviving wives and stepchildren of deceased wage earners, 42 U.S.C. §§ 416(c)(5) and (e)(2) was before the Court. The district court had determined that these requirements were irrebuttable

presumptions and as such were unconstitutional under the authority of *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974), *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973), and *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). The Supreme Court reversed and held the statute constitutional.

Salfi is instructive since the Court addressed two points which are central to plaintiff's argument: (1) the constitutionality of irrebuttable presumptions; and (2) the fact that the purpose of the Act is in some instances thwarted by the operation of the objective test. Plaintiff cites the same cases relied on by the district court in *Salfi* for the proposition that statutes creating conclusive presumptions are disfavored in the law and would be unconstitutional in the instant case. The *Salfi* Court specifically distinguished those cases, however, and this court is of the opinion that they are not controlling here.

Taking plaintiff's argument at face value, it appears that if the Secretary is upheld in the instant case, a result will obtain which is contrary to the intent of the Act. If so, it is a direct inherent consequence of the imperfect operation of the objective test. It is a risk which the Court - if not the Congress - at least considered and found acceptable; the Court stated: "We also think that Congress could rationally have concluded that any imprecision from which [the duration-of-relationship requirement] might suffer was justified by its ease and certainty of operation." 422 U.S. at 780, 95 S.Ct. at 2474.

The Court's discussion in these cases of the statutory scheme of the Social Security Act in general and of the child's

insurance benefits provisions in particular make it clear that in its use of the term "deemed" the Congress intended that dependency would be conclusively established upon proof of the objective criteria - in the instant case, the fact that the stepchildren were living with their stepfather at his death. It follows that they were entitled to share in the child's insurance benefits based on his earnings and that the benefits of the natural children were properly reduced.

An appropriate order will be entered.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-1024

PHALA E. BONEY KYZAR, ETC., ET AL.,
Plaintiffs,

PHALA E. BONEY KYZAR,
Plaintiff-Appellant,

versus

JOSEPH A. CALIFANO, JR.,
Secretary of Health, Education
and Welfare of the United States,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION FOR REHEARING
(July 30, 1979)

Before CLARK, GEE and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in

the above entitled and numbered cause be and the same is here-
by DENIED.

ENTERED FOR THE COURT:

/s/ Charles Clark
United States Circuit Judge

A-12

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION
NO. 77-A-0870-S

PHALA E. BONEY KYZAR,
Plaintiff,

V.

JOSEPH A. CALIFANO, JR.,
Secretary of Health,
Education and Welfare,
Defendant.

Filed:
Nov. 14, 1978

O R D E R

In conformity with and pursuant to the memorandum opinion of the court contemporaneously filed herewith,

It is ORDERED, ADJUDGED and DECREED that the decision of the Secretary of Health, Education and Welfare be and the same hereby is AFFIRMED.

Done, this the 10th day of November, 1978.

(Illegible)
SENIOR UNITED STATES DISTRICT JUDGE

A-13

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION
No. 77-A-0870-S

PHALA E. BONEY KYZAR,
Plaintiff,

V.

JOSEPH A. CALIFANO, JR.,
Secretary of Health
Education and Welfare,
Defendant.

MEMORANDUM OPINION

The plaintiff, Phala E. Boney Kyzar, brings this action pursuant to the provisions of Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), seeking judicial review of a final decision of the Secretary of Health, Education and Welfare reducing the child's insurance benefits payable to her on behalf of her two minor children. Having carefully reviewed the record in light of the argument of counsel, the court is of the opinion that the decision of the Secretary must be affirmed.

The facts are not in dispute. Peter L. Boney, the deceased insured, married Phala in August 1968. At the time of

their divorce in July 1972, they had two children, Virginia and Emily, whom Peter continued to support until his accidental death in September 1974. During the interim, in June 1974, Peter married Candace Wilson, the former wife of Ewart O. Wilson who is the father of her two daughters, Wendi and Shelley. Peter lived with Candace and her children until his untimely death. Ewart, however, continued to support his two children at least through the date of the administrative law judge's decision.

After Peter's death, Phala filed a claim for child's insurance benefits on behalf of Virginia and Emily, the natural children, which was granted. Thereafter, Candace filed claims for mother's insurance benefits and for child's insurance benefits on behalf of Wendi and Shelley, the stepchildren, as well as the natural children. These claims were granted on reconsideration.

As a result of the entitlement to benefits of Candace and the stepchildren, the original award to the natural children was reduced. Phala contested the reduction. After an unfavorable reconsideration determination, she requested a *de novo* hearing before an administrative law judge. In a decision dated February 28, 1977, the administrative law judge ruled that the benefits payable to plaintiff on behalf of the natural children were correctly reduced due to the entitlement of Candace and the stepchildren. This determination became the final decision of the Secretary when it was approved by the Appeals Council on April 28, 1977.

This court's scope of review is narrowly limited to the two-pronged question of whether the decision of the Secretary is supported by substantial evidence and based upon proper legal standards. There being no dispute as to the first aspect of this inquiry, the court's only concern is whether the Secretary properly applied the law to the undisputed facts. The issue is whether the natural children of the deceased insured, who were both actually and statutorily deemed dependent upon the insured at the time of his death, must share their child's insurance benefits with the deceased insured's stepchildren, who met the statutory dependency criteria of the Act, but who were receiving child support payments from and were dependent upon, their natural father. This issue turns on the meaning of the terms "deemed dependent" as used in Section 202(d)(4) of the Act, 42 U.S.C. § 402(d)(4).

Child's insurance benefits are provided for in 42 U.S.C. § 402(d). Section 402(d)(1) states that an unmarried son or daughter - - and under conditions met in this case, a stepson or stepdaughter - - of an individual, who dies fully or currently insured under the Act, may apply for and be entitled to a survivor's benefit, if the applicant is under 18 years of age at the time of application (or is a full-time student and under 22 years of age) and was dependent, within the meaning of the statute, at the time of the parent's death. *Mathews v. Lucas*, 427 U.S. 495 (1976).

A child shall be *deemed dependent* upon his stepfather or stepmother at the time specified in paragraph (1)(c) of this subsection, if, at such

time, the child was living with . . . such stepfather or stepmother. 42 U.S.C. § 402(d)(4).
(Emphasis added).

The administrative law judge treated the term "deemed" as the equivalent of conclusive presumption. The defendant contends that, under this presumption, proof of actual dependency of the stepchild on the insured is not necessary; in fact, a showing of non-dependency is not even permitted. Moreover, support furnished by the noncustodial natural parent is immaterial. The plaintiff, on the other hand, argues that such a construction causes the statute to run afoul of the Due Process Clause of the Fifth Amendment. Plaintiff further contends that the statute creates only a rebuttable presumption and that evidence of actual non-dependency should be admitted.

A survey of Supreme Court decisions dealing with similar provisions of the Social Security Act convinces this court that in § 402(d)(4) Congress meant to establish an objective test by which the dependency requirement of § 402(d)(1) is absolutely established upon proof that a stepchild was, for purposes of this case, living with the stepparent at the time of the latter's death. In particular, this court is guided to this conclusion by the recent cases of *Mathews v. Lucas*, *supra*, and *Weinberger v. Salfi*, 422 U.S. 749 (1975). These cases leave no doubt as to the constitutionality of this statutory scheme.

In *Mathews v. Lucas*, the Court was concerned with whether the child's insurance benefits provisions of § 402(d)(1) & (3) regarding the treatment of certain illegitimate children are

constitutional under the Due Process Clause of the Fifth Amendment. The Court found that the Congressional desire for administrative convenience and economy was served "by presuming dependency on the basis of relatively readily documented facts, such as legitimate birth, or existence of a support order or paternity decree, which could be relied on to indicate the likelihood of continued actual dependency . . ." Congress was thus able "to avoid the burden and expense of specific case-by-case determination in the large number of cases where dependency is objectively probable." 427 U.S. at 509. Notwithstanding its tendency to be overinclusive - - by entitling to benefits some children who were not actually dependent - - the statute was declared constitutional because it met the familiar rational relation test traditionally applied in equal protection analysis. *Id.*

"Such presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny. See *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975). *Id.*

In *Weinberger v. Salfi*, *supra*, the constitutionality of the duration-of-relationship eligibility requirements for surviving wives and stepchildren of deceased wage earners, 42 U.S.C. §§ 416 (c)(5) and (e)(2) was before the Court. The district

court had determined that these requirements were irrebuttable presumptions and as such were unconstitutional under the authority of *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974), *Vlandis v. Kline*, 412 U.S. 441 (1973), and *Stanley v. Illinois*, 405 U.S. 645 (1972). The Supreme Court reversed and held the statute constitutional.

Salfi is instructive since the Court addressed two points which are central to plaintiff's argument: (1) the constitutionality of irrebuttable presumptions; and (2) the fact that the purpose of the Act is in some instances thwarted by the operation of the objective test. Plaintiff cites the same cases relied on by the district court in *Salfi* for the proposition that statutes creating conclusive presumptions are disfavored in the law and would be unconstitutional in the instant case. The *Salfi* Court specifically distinguished those cases, however, and this court is of the opinion that they are not controlling here.

Taking plaintiff's argument at face value, it appears that if the Secretary is upheld in the instant case, a result will obtain which is contrary to the intent of the Act. If so, it is a direct inherent consequence of the imperfect operation of the objective test. It is a risk which the Court - - if not the Congress - - at least considered and found acceptable; the Court stated: "We also think that Congress could rationally have concluded that any imprecision from which [the duration-of-relationship requirement] might suffer was justified by its ease and certainty of operation." 422 U.S. at 780.

The Court's discussion in these cases of the statutory scheme of the Social Security Act in general and of the child's

insurance benefits provisions in particular make it clear that in its use of the term "deemed" the Congress intended that dependency would be conclusively established upon proof of the objective criteria - - in the instant case, the fact that the stepchildren were living with their stepfather at his death. It follows that they were entitled to share in the child's insurance benefits based on his earnings and that the benefits of the natural children were properly reduced.

An appropriate order will be entered.

This 10th day of November, 1978.

(Illegible)

SENIOR UNITED STATES DISTRICT JUDGE

No. 79-687

Supreme Court, U. S.

FILED

DEC 20 1979

MAURICE H. ALK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

PHALA E. BONEY KYZAR, PETITIONER

v.

PATRICIA R. HARRIS, SECRETARY OF
HEALTH, EDUCATION, AND WELFARE

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

**MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION**

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Section 202(d)(4) of the Social Security Act, 42 U.S.C. 402(d)(4), provides that "[a] child shall be deemed dependent upon his stepfather or a stepmother * * * for purposes of child's insurance benefits] if * * * the child was living with or was receiving at least one-half of his support from such stepfather or stepmother." Petitioner contends that Section 202(d)(4) establishes only a rebuttable presumption of dependency for a child living with a stepparent. Alternatively, petitioner contends that Section 202(d)(4) is unconstitutional under the Due Process Clause if dependency is conclusively established by the fact that the child was living with the stepparent.

1. Petitioner is the former wife of the deceased insured, Peter L. Boney. During their marriage, the Boneys had two children, Virginia and Emily. In July 1972, the Boneys were divorced. Mr. Boney continued to support his natural children until his accidental death in September 1974 (Pet. App. A-4).

In June 1974, Mr. Boney remarried. His new wife had two children, Wendi and Shelly, by a previous marriage. These children were supported by their natural father at least through the date of the administrative hearing in this case. Mr. Boney was residing with his new wife and his stepchildren at the time of his death (Pet. App. A-4).

After Mr. Boney's death, petitioner filed for child's insurance benefits on behalf of the Boneys' natural children. Her claim was granted. Thereafter, Mr. Boney's widow filed for benefits for herself and for Mr. Boney's stepchildren. These claims were granted and resulted in a reduction of the original award payable to petitioner on behalf of Mr. Boney's natural children (Pet. App. A-4).¹

Petitioner contested this reduction in benefits for the Boneys' natural children. Following a hearing, an administrative law judge determined that the reduction was proper. This determination became the final agency decision when the Appeals Council approved it in April 1977 (Pet. 7; Pet. App. A-4). On judicial review, the United States District Court for the Northern District of Alabama upheld the Secretary's determination (Pet. App.

¹Because Mr. Boney's death was accidental, the nine-month duration-of-relationship requirement of 42 U.S.C. 416(e) is inapplicable to the claim for the stepchildren's benefits. See 42 U.S.C. 416(k)(1)(A).

A-13 to A-19). The court of appeals affirmed on the basis of the memorandum opinion of the district court (Pet. App. A-1 to A-9; 597 F. 2d 68).

2. Under the Social Security Act, a stepchild is eligible for child's insurance benefits if, among other conditions, the stepchild was "dependent" on the insured stepparent at the time of the stepparent's death. 42 U.S.C. 402(d)(1)(C)(ii). The Act further states, in the provision at issue here, that "[a] child shall be deemed dependent upon his * * * [stepparent at the time of the stepparent's death] if, at such time, the child was living with * * * such * * * [stepparent]." 42 U.S.C. 402(d)(4). Petitioner contends that this provision should be construed as establishing only a rebuttable presumption of dependency and that she should have been allowed to introduce evidence that Mr. Boney's stepchildren, although living with him at the time of his death, were not in fact dependent upon him because they were supported by their natural father.

This contention was correctly rejected by the Secretary and the courts below. The text of the statute plainly establishes a conclusive presumption by providing that a stepchild "shall be deemed dependent" when residing with the stepparent. The only other court of appeals to have considered the dependency question under 42 U.S.C. 402(d)(4) has agreed with the courts in this case that the statute creates a conclusive presumption. See *Eisenhauer v. Mathews*, 535 F. 2d 681, 686 (2d Cir. 1976) (footnote omitted; emphasis added):

The "deemed dependent" provision is written in the disjunctive; a child, to be deemed dependent, must have been living with or receiving one-half of his support from the insured stepparent. By this disjunctive language, then, dependency is statutorily

presumed if the child was living with the stepparent or was actually dependent upon the stepparent. *Actual dependency, contrary to appellant's assertions, need not be shown if stepparent and child were living together at the time of the insured stepparent's death.*

Moreover, this Court has interpreted a related provision of the Social Security Act to establish an irrebuttable presumption of dependency. See *Mathews v. Lucas*, 427 U.S. 495 (1976) (upholding constitutionality of 42 U.S.C. 402(d)(3) of the Act, under which an illegitimate "child shall be deemed dependent" upon a parent under certain circumstances, including "living with" the parent). Indeed, Congress' fundamental approach in the Social Security Act is to have a claimant's eligibility for benefits determined conclusively on the basis of objective and easily administered criteria, such as living arrangements, rather than to require a particularized resolution of specific facts in each case regarding such elusive matters as dependency. See, e.g., *Califano v. Boles*, No. 78-808 (June 27, 1979); *Califano v. Jobst*, 434 U.S. 47 (1977); *Mathews v. DeCastro*, 429 U.S. 181 (1976); *Mathews v. Lucas*, *supra*; *Weinberger v. Salfi*, 422 U.S. 749 (1975). As the Court has recognized, Congress has not made "actual dependency * * * either a sufficient or a necessary condition of eligibility in every case." *Califano v. Jobst*, *supra*, 434 U.S. at 52 (footnote omitted). The dependency provision of 42 U.S.C. 402(d)(4), as construed by the Secretary and the courts below, is in accord with this general scheme.

3. Petitioner also contends that 42 U.S.C. 402(d)(4), to the extent it establishes a conclusive and irrebuttable presumption of dependency, violates the Due Process Clause. But this Court has repeatedly sustained the

constitutionality of provisions of the Social Security Act that, like 42 U.S.C. 402(d)(4), dispense with proof of actual dependency in each case and instead establish conclusive eligibility presumptions. See, e.g., *Califano v. Boles*, *supra*; *Califano v. Jobst*, *supra*; *Mathews v. DeCastro*, *supra*; *Mathews v. Lucas*, *supra*; *Weinberger v. Salfi*, *supra*.²

Administrative convenience, ease of application, and certainty of result, all of which are fostered by such statutory presumptions, are important considerations in formulating the conditions for benefits under the Act. "General rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." *Califano v. Boles*, *supra*, slip op. 3, quoting *Califano v. Jobst*, *supra*, 434 U.S. at 53. Congress is entitled to draw "upon its own practical experience * * * [to] tailor[] statutory classifications in accord with its calculations of the likelihood of actual * * * [dependency] suggested by a narrow set of objective and apparently reasonable indicators," and such classifications will be set aside only if "Congress' assumptions are so inconsistent or insubstantial as not to be reasonably supportive of its conclusions that individualized factual inquiry in order to isolate each nondependent child in a given class of cases is unwarranted as an administrative exercise."

²In each of these cases, a claimant alleged that he fell within the category of persons Congress intended to benefit under the Social Security Act but that he was barred from proving that fact because of an imprecise conclusive presumption. Here, by contrast, petitioner is receiving benefits under the Act and is merely complaining that her level of benefits has been reduced pursuant to the Act because other claimants were also allowed to recover.

Mathews v. Lucas, *supra*, 427 U.S. at 515-516. "There is no question about the power of Congress to legislate on the basis of such factual assumptions." *Califano v. Jobst*, *supra*, 434 U.S. at 53. Moreover, these legislative classifications are not rendered invalid by the fact they contain conclusive presumptions concerning eligibility. See *Weinberger v. Salfi*, *supra*, 422 U.S. at 768-774.

Measured against this standard, the presumption challenged in the instant case is plainly valid. Here, as in *Mathews v. Lucas*, *supra*, 427 U.S. at 509, "by presuming dependency on the basis of relatively readily documented facts," such as the stepchild's residence with the stepparent, Congress was able "to avoid the burden and expense of specific case-by-case determination in the large number of cases where dependency is objectively probable." Judging this "broad legislative classification * * * by reference to characteristics typical of the affected classes * * *," *Califano v. Jobst*, *supra*, 434 U.S. at 55, there can be little doubt that the living arrangement of the stepchild is a reasonable indicator of dependency. The Due Process Clause requires no more. See *Weinberger v. Salfi*, *supra*, 422 U.S. at 768-777.³

³Petitioner also contends (Pet. 12) that 42 U.S.C. 402(d) cannot be applied to reduce her children's benefits because they have a "property interest" in the existing level of benefits. This Court has already answered that claim. *Flemming v. Nestor*, 363 U.S. 603, 610-611 (1960). In any event, the scope and extent of property interests are determined by reference to the substantive law that gives rise to such interests (*Bishop v. Wood*, 426 U.S. 341, 344 & n.7 (1976)), which in this case is the Social Security Act. That legislation expressly qualifies petitioner's interest in benefits where, as here, there are stepchildren of the wage-earner residing with him.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1979